United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

ORIGINAL

76-4054

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,
Petitioner,
against
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,
and
ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION and
WESTERN UNION INTERNATIONAL, INC.,
Intervenors.

BRIEF OF INTERVENOR ITT WORLD COMMUNICATIONS INC.

LEBOEUF, LAMB, LEIBY & MACRAE
Attorneys for Intervenor
ITT World Communications Inc.
140 Broadway
New York, New York 10005

Of Counsel:
CHARLES P. SIFTON,
JOHN S. KINZEY,
RICHARD C. COLE,
and
HOWARD A. WHITE,
JOHN A. LIGON,

ITT WORLD COMMUNICATIONS INC.
67 Broad Street
New York, New York 10005
(212) 797-3300

November 19, 1976

TABLE OF CONTENTS

Table of Cases and Authorities

PAGE

Statutes:

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4054

RCA Global Communications, Inc.,
Petitioner,

against

Federal Communications Commission and
United States of America,
Respondents,

and

ITT World Communications Inc.,
TRT Telecommunications Corporation and
Western Union International, Inc.,
Intervenors.

BRIEF OF INTERVENOR ITT WORLD COMMUNICATIONS INC.

Preliminary Statement

Intervenor ITT World Communications Inc. ("ITT Worldcom"), a common carrier of international telegrams, submits this brief in opposition to the Petition of RCA Global Communications, Inc. ("RCA Globcom") which seeks to reverse portions of a Report and Order and Notice of Proposed Rulemaking (the "Order") (JA 1-44)[1] released by respondent Federal Communications Commission

1. References in the form "JA" followed by a page number are to pages of the Joint Appendix.

("FCC" or the "Commission") on January 7, 1976, 57 F.C.C. 2d 190 (1976). In that Order, the FCC substantially revised, for the first time since its original promulgation in 1943, the International Formula, prescribed pursuant to 47 U.S.C. § 222(e), which governs the distribution of outgoing international telegraph traffic by the domestic telegraph company, The Western Union Telegraph Company ("Western Union"), among the various international telegraph companies, including RCA Globcom, ITT Worldcom, and intervenors, Western Union International, Inc. ("WUI") and TRT Telecommunications Corporation ("TRT").

By Memorandum Opinion and Order released March 5, 1976, 58 F.C.C. 2d 266 (1976) (JA 110-112), the FCC granted an interim stay of the Order pending its consideration of a motion by RCA Globcom for a stay pending review by this Court and of a motion by WUI for reconsideration of the FCC's original Order.

On September 27, 1976, the Commission released a further Memorandum Opinion and Order (JA 70-84) rejecting RCA Globcom's motion for a stay and WUI's motion for reconsideration. On October 19, 1976, this Court denied a motion by RCA Globcom, joined in by WUI, seeking a stay of the FCC's Order pending review by this Court.

ISSUES PRESENTED FOR REVIEW

1. Was the FCC obliged, in the circumstances of this proceeding, to afford Petitioner RCA Globcom and Intervenor WUI an oral evidentiary hearing, in place of the written evidentiary hearing provided, under the provisions of Communications Act § 222(e)(3) requiring a "full hearing," as a prerequisite to finding the International Formula unjust, unreasonable, or inequitable or not in the public interest?

2. Did the FCC abuse its discretion, or act arbitrariiy or capriciously in finding the old International Formula irrational, inequitable, unjust or not in the public interest?

3. Did the FCC abuse its discretion, act arbitrarily or capriciously or fail to state the basis and purpose for its action in prescribing the new International Formula?

4. Did the FCC, in striking down the old International Formula and in prescribing a new one, make competition a dispositive test of what it found to be the "public interest"?

ITT Worldcom submits that the answer to each of these questions is "no," and that, as a result, the Commission's Order should be affirmed.

STATEMENT OF THE CASE

Procedural History[2]

This case was commenced over twelve years ago in September, 1964 with the filing of a complaint by ITT Worldcom alleging that the existing International Formula was unjust, inequitable, irrational and not in the public interest (JA 113). Initial pleadings were filed in response to this complaint (JA 131, 141, 153, 160, 162), but no further action was taken by the FCC until December 13, 1972, when, after ITT Worldcom filed a petition to compel agency action unlawfully withheld and unreasonably delayed with the Court of Appeals for the District of Columbia Circuit[3], the

2. Considering the fact that RCA Globcom raises as its principal point in this review proceeding, alleged deficiencies in the procedures afforded it by the FCC, it is disconcerting that RCA Globcom devotes only two paragraphs of its brief (at pp. 13-14) to describing the procedures followed below and, as noted hereinafter, omits significant portions of the proceedings from its Statement of the Case. The brief of Intervenor WUI contains no Statement of the Case.

3. Cf. Administrative Procedure Act, Section 10(e), 5 U.S.C. § 706(1). The proceeding was entitled *ITT World Communications Inc.* v. *USA and FCC,* Docket No. 72-1771 (D.C. Cir., filed August 11, 1972).

FCC adopted a Notice of Inquiry and Proposed Rule-Making, 38 F.C.C. 2d 543, in which it proposed to consider the International Formula along with a variety of other pending matters relating to the domestic handling of international telegraph traffic (JA 85). On May 25, 1973, the Chief of the FCC's Common Carrier Bureau requested all interested parties to update their 1964 pleadings (JA 166), which was done (JA 169, 173, 176, 181, 189). Thereafter, on November 21, 1973, while ITT Worldcom's court proceeding to compel agency action was still pending, the FCC instituted a separate proceeding to investigate the inequities, injustice and irrationality of the International Formula and its effect on the public interest (JA 93; 43 F.C.C. 2d 1174).

The FCC's order instituting the evidentiary phase of this proceeding specifically set forth the issues of fact and law to be addressed by the parties, in the following language (JA 100-101):

> "Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 222, and 403 of the Communications Act of 1934, That an investigation is hereby instituted to determine whether the distribution of telegraph message traffic under the formula prescribed pursuant to Section 222(e)(1) of the Communications Act for the distribution of outbound international message traffic handled by The Western Union Telegraph Co. is unjust, unreasonable, or inequitable or not in the public interest and, if so, the nature of the amendments which the Commission should make thereto;
>
> "IT IS FURTHER ORDERED, that the investigation ordered herein shall include inquiry into the following issues:
>
> "(1) The exact manner in which the distribution of traffic is presently being made, broken down by carrier, category of traffic, and areas and sub-areas.

"(2) The nature, extent and reason for the existing overages and deficiencies in assigned quotas. In this connection, each carrier shall present full data with respect to its overages or deficiencies, by area and sub-areas, as of each year-end for the ten (10) years ending December 31, 1972, and an estimate for the year ending December 31, 1973; as well as the totals, by area and sub-area, since distribution began under the formula.

"(3) The present defects in the formula, pointing out with specificity the effect of each claimed defect not only on the respondent, but also on other international record carriers and on the quality of service provided to and the rates charged the using public.

"(4) The specific amendments which should be made to the formula to remove each such defect, the effect each such amendment will have on respondent, other international record carriers, and on the quality of service provided to and the rates charged the using public.

"In answering issues (3) and (4), attention should be directed to the proposals of ITT, WU, and TRT.

"Responses and replies will, of course, also be directed to any new matter which may be raised in the initial statements filed pursuant hereto." (Footnote omitted)

Thus, the FCC specifically called attention to the proposal of TRT that a new formula should be devised which would allocate unrouted traffic in direct proportion to the international carriers' respective shares of the total amount of routed traffic handled by each (JA 98, 101). That is, even as the evidentiary phase of the proceeding began three years ago, RCA Globcom and all the other international carriers were on notice that what eventually became the new formula was among the issues to be addressed in the proceeding.

What the FCC called for in its order instituting the proceeding were not "comments"[4] but rather "statements of fact" and "memorandums of law relative to the issues set out herein," in the following directive (JA 101):

> "(1) Respondents shall file, and other interested persons may file, within sixty (60) days of the release of this Order, statements of fact and memorandums of law relative to the issues set out herein;
>
> "(2) Responses to initial statements shall be filed thirty (30) days after the statements are due, and replies to such responses shall be filed within fifteen (15) days after the filing of responses;
>
> "(3) All statements filed by a respondent, or other interested persons, shall be served upon all other respondents and all further pleadings shall be served on those respondents and all other persons filing statements herein;"

The Commission further stated in its order that (JA 100):

> "To the extent that an oral hearing is necessary or desirable, upon review of the submissions indicated above, we shall, of course, consider an appropriate request by any party, or take action in our own motion."

Two months later, but before any of the submissions called for had been filed and without in any manner making an offer of proof indicating the specific factual issues making it "appropriate" that the evidentiary presentation be oral rather than written, or how it would be prejudiced if

---

4. Based apparently on a correct analysis of the proceeding as involving primarily legal and policy matters rather than disputed issues of fact, "comments" were what were filed by RCA Globcom at this as well as the two earlier pleading stages of this proceeding (JA 141, 173, 217, 324, 396, 509, 609).

evidence was presented in written form,[5] RCA Globcom sent the Commission a conclusory letter stating its "belief" that it was entitled to a "full hearing" under Section 222(e) of the Communications Act, 47 U.S.C. § 222(e), and that in order for the hearing to be "full," evidence should be presented orally (JA 192). On March 11, 1974, RCA Globcom again wrote to the Commission, this time seeking specific relief in the form of an order by the FCC directing that Western Union "undertake an independent, statistical study to determine the exact manner in which international message traffic is presently being distributed among the international record carriers pursuant to the International Formula" (JA 201). In making this request RCA Globcom noted that its proposal would provide a basis on which the parties to the proceeding could "determine and agree to the facts on an informal basis outside of the hearing process" (JA 203). It further noted that "absent the agreement of the parties, an oral evidentiary hearing must be held" (JA 203).

On May 10, 1974 (still prior to the periodically adjourned submissions of the statements of fact and memoranda of law called for by the FCC's November, 1973 order), the FCC responded to these letters as follows (JA 103):

> "The present request arises from a series of meetings between the IRC's, WU, and the staff which were convened at RCA's request to discuss RCA's contention that certain statistical data called for by the issues were unavailable. After discussion, the

5. 5 U.S.C. § 556(d) provides in this regard:

> "In rule making or in determining claims for money or benefits or applications for initial licenses, an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

It is conceded by RCA Globcom that proceedings to revise the International Formula "are, in a technical sense, 'rule makings.'" (Brief at 31).

> parties appear to have agreed upon a plan whereby WU would collect the desired data and the participating IRC's would bear equitably the costs of the study.
>
> * * *
>
> "Both RCA and WUI urge the necessity of the proposed study before the parties can respond to the issues. They argue that the issues require a statistical analysis of the manner in which international message traffic is presently distributed under the formula, broken down by carrier, area, and sub-area.
>
> * * *
>
> "The proposed study is necessary, they say, to provide accurate data from which to determine the effects on a given carrier of proposed changes in the formula. They contend that because of the hearing requirement in Section 222(e)(3), the commission cannot lawfully change the formula without information on such effects." (Footnotes omitted)

As a result, the FCC directed that the Western Union study, urged by RCA and WUI as necessary to comply with the hearing requirements of Section 222(e), be conducted (JA 105).

Thereafter, July 8, 1974, prior to the completion of the Western Union study, all five respondents (RCA Globcom, ITT Worldcom, WUI, TRT and Western Union) filed written submissions in response to the FCC's request for statements of fact and memoranda of law. (RCA Globcom, JA 217-238; ITT Worldcom, JA 239-281; WUI JA 282-292; TRT, JA 293-315; Western Union, JA 316-324). The same parties next filed written submissions in compliance with the FCC's order for responsive statements of fact and memoranda of law, on August 16, 1974. (RCA Globcom, JA 324-340; ITT Worldcom, JA 341-361; WUI, JA 362-376; TRT, JA 377-382; Western Union, JA 383-388). Replies on fact and law issues were then filed

on September 6, 1974. (RCA Globcom, JA 396-407; ITT Worldcom, JA 408-428; WUI, JA 389-395; TRT, JA 429-433; Western Union, JA 434-437).

The results of the Western Union study, which covered 13 consecutive weeks, were summarized in a detailed report by the International Quota Bureau[6], dated June 16, 1975. (JA 472-508). A further result of the study was the Policy Research Estimate prepared for the Office of Telecommunications Policy, dated June 2, 1975, which *inter alia,* analyzed and summarized the results of the traffic study, and formulated the alternatives available to the Commission (JA 438-471).

On May 28, 1975, in order to afford the parties a full hearing, the FCC issued a further opinion and order permitting the interested carriers to supplement their earlier submissions by making any changes or additions they found appropriate in light of the completed Western Union factual study (JA 106-109). Thereafter, on August 1, 1975, four of the five parties made supplementary factual and legal submissions (RCA Globcom, JA 509-559;[7] ITT Worldcom, JA 560-575; WUI, JA 576-595; TRT, JA 596-608[8]).

In its supplemental submission, RCA Globcom recognized that it had, in its earlier submissions, "stated it appeared that the completion of the Western Union statistical study would provide a sufficient factual basis to enable the Commission to proceed with a paper proceeding rather than an oral, evidentiary one" (JA 528). It then, however,

---

6. The International Quota Bureau is the professional staff of the International Formula Committee, the body which administers the international formula. RCA Globcom, ITT Worldcom, WUI and TRT are all represented on this Committee (JA 1).

7. Annexed to RCA Globcom's submission were twelve (12) attachments, including affidavits, extensive analytical tables and a photograph (JA 533-559).

8. ITT Worldcom's submission likewise annexed statistical tables analyzing the Western Union data (JA 572-73), as did WUI's (JA 595) and TRT's (JA 602-607).

without citing any deficiency whatsoever in the Western Union study, went back on its assurances that the expensive and time-consuming study[9] would be sufficient and asserted "again . . . its right to a full hearing." (*Ibid.*) The only basis for RCA Globcom's demand was "the very far reaching significance of the proceeding on the rates to the public and the effects on the carriers" (*Ibid.*), although nothing in the Western Union study indicated that the significance of the proposed formula revisions had changed in any way from what the parties understood it to be when they made their original submissions.[10] RCA Globcom then made a one sentence conclusory offer of proof "to show, among other things, through expert economic, financial and marketing testimony the effect of the proposals suggested by ITT and TRT, as well as the OT[11] draft report." (*Ibid.*) This conclusory offer, at the tail end of RCA Globcom's fourth submission to the Commission, should be contrasted with the list of specific matters which RCA Globcom now states to this Court it wanted to present to the Commission orally. (Brief at 33-34.) The list it presents at this stage of the proceeding could have been presented before the agency in order to afford the agency an opportunity to consider matters now presented for the first time on appeal.

Following this fourth round of essentially factual submissions, a final and fifth round of replies was presented

9. The costs of the study were shared by all of the parties (JA 105).

10. Thus, even in its first submission, RCA Globcom argued against the elimination of its $49.8 million deficiency accumulated under the formula, a concept explained below, and recognized that the proceeding might result in a reallocation of traffic among the carriers of such significance as to raise questions on the part of RCA Globcom concerning excess capacity (JA 234).

11. The "OT" report refers to the report prepared for the Office of Telecommunications Policy by the Policy Support Division of the Office of Telecommunications, U. S. Department of Commerce (*supra*, p. 9, JA 438-471). That Report recommended elimination of the formula and a requirement that all traffic be routed—a recommendation not adopted by the FCC in the Order under review (JA 27).

to the FCC on August 28, 1975. (RCA Globcom, JA 609-633; ITT Worldcom, JA 634-640; WUI, JA 641-657; TRT, JA 658-668; Western Union, JA 669-672.)

On January 7, 1976, the FCC released the thirty-six page Report and Order which is the subject of this proceeding (JA 1-36). In that Order, the FCC concluded "that the present method of distribution embodied in the international formula is unjust, unreasonable, inequitable and not in the public interest . . ." (JA 2). In place of the existing formula, the Commission promulgated a new formula, which it designated as an interim one, and instituted a further investigation to determine if it is feasible for all international telegraph traffic to be routed.[12] The factual findings in support of these conclusions are set forth below.

---

12. RCA Globcom taxes the Commission with failing to state *in haec verba* in the portion of its Order bearing the caption "Interim Formula" (JA 28-30) that the new formula was found by it to be "just, reasonable, equitable and in the public interest." The significance of the complaint is hard to grasp. The Order refers to all of the statutory words of art or their equivalents as bases for the new formula. Thus, *inter alia:*

> ". . . we believe that the traffic should be distributed on the basis of customer choice. In this way, the *public interest* will be served, since the public will make its own decisions" (JA 23).
>
> "In summary, we have concluded that the *public interest* in the provision of international telegraph services will best be served by relying primarily on customer choice for the distribution of traffic among the several international record carriers" (JA 35).
>
> ". . . the interim formula will provide an *equitable* means of distribution which will focus on customer selection . . ." (JA 28).
>
> ". . . the eventual role of WU . . . will be reduced; as will the potential for *unfair* advantage to any party . . ." (JA 28).
>
> "In any event, by placing distribution of traffic on a *rational* and competitive basis, we can minimize this danger [from 'the inequities of the formula'] and maximize the possibility of future benefits" (JA 17).
>
> "In this way, we believe that unrouted traffic may be distributed *equitably,* without *undue* benefit to any party" (JA 22). (Emphasis supplied.)

The FCC's Findings

As the FCC found (using the undisputed facts developed in the Western Union study), in 1974 a total of 8,640,411 telegraph messages were sent outbound from the United States to points overseas, yielding revenues of $21,486,392.[13] As the FCC also found, this level of international telegraph traffic has remained fairly stable in recent years and the carriers accepted the Western Union study as representative of current operations under the formula (JA 103).

The largest part, approximately two-thirds, of this outbound telegraph traffic has in recent years been specifically routed by the customer via a designated international carrier and has become known as "routed traffic" (JA 11). Customers originating this traffic have either delivered it directly to the offices of one of the international carriers in the so-called "gateway cities" in which those carriers are authorized by the FCC to pick up traffic, or the customers have delivered it to an office of Western Union[14] with a designation of the particular international carrier which the customer desires to have handle the international portion of the transmission (JA 24-25).

The balance of the 8.6 million messages, or approximately 3,000,000 messages—so-called "unrouted traffic"—are delivered to Western Union by the customer without indication as to which international carrier is to handle the international transmission (JA 11). It is the allocation of these 3,000,000 unrouted outgoing international telegraph messages among the international carriers that is at issue in this proceeding.

---

13. The Western Union study was, without dispute from the parties, supplemented by reports of operations by the carriers themselves for calendar year 1974, filed with the FCC pursuant to 47 C.F.R. § 43.61 (JA 11).

14. Western Union, the only domestic telegraph carrier, maintains offices throughout the United States (JA 3).

The need for a formula to allocate unrouted outgoing telegraph traffic arose as a result of the merger of Western Union with its only competitor in the domestic telegraph business, The Postal Telegraph Company, which was authorized by Congress in 1943 (JA 3). *Application for Merger of the Western Union Telegraph Co. and Postal Telegraph, Inc.,* 10 F.C.C. 148 (1943). As a result of this merger, Western Union became the only domestic telegraph company, and it was placed in a position in which it could misuse this *de facto* monopoly power to the detriment of the international telegraph companies by favoring its own international cables division, which had theretofore handled a major part of the international telegraph traffic generated by Western Union, or by favoring one or more of the international carriers after it divested itself of its international cables division, as it was required to do by the legislation authorizing the merger. 47 U.S.C. § 222(e)(2). (JA 3-4). To guard against this potential abuse, Congress provided in the merger legislation for the development of a formula which would allocate international telegraph traffic filed with Western Union among the international carriers in a manner which was rational, just, equitable and in the public interest (JA 4). 47 U.S.C. § 222(e).

The formula prescribed by the FCC in 1943 divided international telegraph traffic into an extraordinarily complex variety of categories and subcategories, determined by points of origin and destination, and took into account certain special arrangements for the exchange of traffic between Western Union and particular international carriers which were in effect when the merger occurred (JA 5-6). Unrouted traffic, under the formula, was to be used as a balancing factor in an attempt to ensure that each international carrier would receive a total amount of routed and unrouted traffic in each category of traffic which would approximately maintain the carrier's pre-merger

share of the international telegraph market for that category (JA 4, 6). The formula, in effect, established a pool of unrouted traffic from which each international carrier would be allocated an amount sufficient, when added to that carrier's routed traffic, to provide it with its pre-merger share of the market for the market category involved (JA 31). Because of wartime dislocations, the pre-merger division of the market which the formula sought to freeze was established as the market shares the carriers received in 1942, or in the last prior 12-month period in which communications were maintained to the relevant geographic area (JA 5).

The balancing process was carried forward from year to year so that if a particular carrier failed to attain its pre-merger share of the market for a particular time period from both routed traffic and unrouted traffic awarded under the formula, it would be given a "deficiency," to be made up by an award of unrouted traffic in future periods (JA 5-6). Further, in order to ensure that Western Union would not favor its own cables division pending divestiture,[15] the formula provided that if a particular carrier exceeded its pre-war share of the market from routed traffic alone, the excess would be declared an "overage" which would be counted against the carrier in determining whether it was entitled to unrouted traffic in future periods (JA 5-6).

As the FCC found below, the formula failed in operation because of two faulty assumptions. First, the formula assumed the continued availability of a sufficient volume of unrouted traffic, so that deficiencies would be kept at a minimum. In fact, the volume of unrouted traffic shrank

15. There was concern that Western Union would, pending divestiture, be in a position to insert routings via its international cables division without permission from the customer—a concern which proved well grounded, *Western Union Telegraph Co.*, 25 F.C.C. 35 (1958), *rev'd. on other grounds sub nom. Western Union Telegraph Co.* v. *U. S.*, 267 F.2d 715 (2d Cir. 1959), but which became of less moment once the divestiture was finally accomplished in 1963. 35 F.C.C. 233 (1963).

so much relative to the total volume of traffic that there was not enough unrouted traffic to achieve the objective of retaining base period market shares (JA 31). Instead of being minimized, deficiencies continued to accumulate without prospect of ever being eliminated (JA 15). Secondly, the formula failed because it assumed that a carrier's share of routed traffic would remain relatively stable, controlled by the disincentive implicit in the formula against a carrier's seeking routings. Thus the formula assumed that a carrier would have no incentive to seek additional routed traffic, since it would lose an offsetting amount of unrouted traffic. While this second assumption might have had some validity in connection with the FCC's efforts to prevent Western Union from inserting routings via its own international cables division, it would not and did not prove valid in situations in which a carrier's share of routed traffic grew substantially as a matter of customer preference or the expansion of the carrier's gateway operations (JA 15).

In this situation, a carrier which through a substantial shift in routed traffic found itself attaining more than its prewar share of the market through routed traffic alone, obtained ever-increasing overages without any hope of obtaining unrouted traffic under the formula. Other carriers found themselves in permanent deficiency positions as a result of such shifts in market preferences. Thus, by 1974, RCA Globcom had accumulated deficiencies totalling $49 million, while ITT Worldcom had accumulated overages in excess of $24 million (JA 15-16).

In these circumstances, the operation of the formula became quite irrational. A carrier like ITT Worldcom, in a decisive overage position, could do nothing to obtain a share of unrouted traffic short of refusing to honor customer routings—a step prohibited by the original formula —a step, moreover, for which the formula provided no incentive, since what would be won in unrouted traffic would

be lost (along with customer goodwill) in routed traffic. A carrier like RCA Globcom, in a decisive deficiency position, was assured unrouted traffic whether its share of routed traffic grew or diminished. The award of unrouted traffic became simply an arbitrary windfall or subsidy to c. . riers, like RCA Globcom and WUI, in a deficiency position, and an irrational deprivation to carriers, like ITT Worldcom and TRT, in an overage position. One set of carriers was favored while the other was disfavored, without any reason for the distinction, and without any steps which the disfavored carriers could take under the formula to change their situation (JA 15-16).

Not only was the formula operating in an irrational and unjust fashion, but it treated the carriers inequitably by awarding unrouted traffic among them in grossly disproportionate shares. Thus, ITT Worldcom, RCA Globcom, WUI and TRT received unrouted traffic in shares of 11%, 43%, 38% and 1.4%, respectively (JA 13). This irrational division, the FCC found, bore no relationship whatsoever to the carriers' shares of routed traffic, representing customer preferences among the carriers. Thus, in 1974, RCA Globcom and ITT Worldcom obtained nearly equal shares of routed traffic, with ITT Worldcom showing a slight edge (33.12% vs. 33.68%), while WUI and TRT obtained respectively 26.65% and 5.55% (JA 13). However, when the irrational windfall award of unrouted traffic was taken into account and total market shares calculated, ITT Worldcom lost its slight edge over RCA Globcom which, as a result of its irrational subsidy, was given a 38.38% of the total market versus 25.93% for ITT Worldcom, 30.59% for WUI and 4.10% for TRT (JA 13).

Moreover, as a result of the self-perpetuating overages and deficiencies, the effort of the formula drafters to split up unrouted traffic within each category and subcategory to restore base period market shares in each particular

market area was completely frustrated (JA 14). Thus, the FCC found that, in 1974, gateway-originated unrouted traffic was allocated exclusively to one carrier in 46 of the 52 destination sub-areas recognized by the formula (JA 14). RCA Globcom received 59% of the unrouted traffic allocated on this type of exclusive basis while ITT Worldcom received less than 5%. Proportioned distribution was in effect with regard to only 15% of total traffic (JA 14).

Obviously, such unjust and irrational inequities could, as the FCC found, serve no public purpose. The threat to competition posed by Western Union's *de facto* monopoly and the opportunity that monopoly afforded Western Union to favor its own international cables division was substantially reduced in 1963 by the divestiture which led to the creation of an independent WUI. *Application for Merger of the Western Union Telegraph Co. and Postal Telegraph, Inc.*, 35 F.C.C. 233 (1963).[16] The formula's objective of freezing market shares was not being accomplished, since market shares shifted by and large quite independently of the deterrents implicit in the formula. Moreover, even if those few situations in which proportionate distribution of unrouted traffic still existed had constituted the rule rather than the exception,[17] the FCC found that the balancing provisions served as a disincentive to service improvements which was, in its view, not in the public interest (JA 16-17). Under the theory of the original formula, each time a carrier added a new routed customer to its pre-1943 market share the carrier would lose an unrouted message, thus discouraging efforts to improve service so as to win customers from the competition (JA 17, 74).

16. The following year ITT Worldcom filed its complaint requesting revision of the formula (JA 113).

17. As mentioned above, the areas in which proportionate distribution was still in effect represented only about 15 per cent of the total market.

Based on these undisputed facts, the FCC determined in the proceeding below that the existing formula was unlawful because it was unfair, irrational, inequitable and served no public purpose (JA 2, 17-20). The public interest would best be served, the FCC found, if unrouted traffic was distributed on the basis of customer choice, as indicated by the relative shares of routed traffic (JA 27, 35). In order to achieve this objective, the FCC retained the provision of the old formula which honored customer routings (JA 28). However, by making three revisions to the old formula, the FCC gave added force to the public's choice of one carrier over another, so as to stimulate improvements in service quality (JA 17). First, the new formula provided that unrouted traffic would be awarded in direct proportion to the routed traffic earned by the carrier, so that each decision by a customer to route via a particular carrier would carry with it not only the revenues to be earned from that customer's message but also the revenues from a corresponding share of the unrouted traffic (JA 28). Secondly, the FCC eliminated the statistical concept of overages and deficiencies, which were a major cause of arbitrary and inequitable distribution of unrouted traffic under the old formula and which would have frustrated the FCC's intention to link customer choice to an award of a share of unrouted traffic (JA 30-31). Thirdly, the new formula provided for periodic revisions to reflect changes in the carriers' respective shares of routed traffic, in order to make the incentive for service improvements a continuing one tied to changing conditions (JA 29). A further finding supporting the formula revision, of which RCA Globcom has completely lost sight, was that the revision would lead to greater simplicity in formula administration (JA 29, 31-32).

By putting all carriers in a current position of equality in competing for routed traffic, the new formula is, as the FCC found, equitable and just. By using the allocation of the pool of unrouted traffic as a means to the end of service improvements, the FCC found a rational basis for the distribution of such traffic which is in the public interest.

POINT I

RCA GLOBCOM OBTAINED FROM THE FCC THE HEARING TO WHICH IT WAS ENTITLED.

RCA Globcom's primary attack on the FCC's Order is based on alleged procedural error: that the FCC denied it the "full hearing" called for by Section 222(e)(3) of the Communications Act, 47 U.S.C. § 222(e)(3).[18] The argument, based, as it is, on an abbreviated and distorted[19] view of what happened below, is without merit, since even assuming that RCA Globcom adequately preserved the

18. Similarly the principal contention made by WUI in its brief is that the Commission failed to afford it a "full" hearing. WUI's short discussion of this issue advances no arguments which are not also made by RCA Globcom and answered below. Like RCA Globcom, WUI fails to establish that a trial-type hearing was required by law, that it raised any issues below which made such a hearing appropriate, or that it was prejudiced in any way or denied an opportunity to present its case by the fact-finding procedures which the FCC adopted.

19. For example, this was not a "notice and comment" proceeding as RCA Globcom repeatedly alleges (Brief at 2, 18). Although RCA Globcom of its own choice limited itself to what it chose to call "Comments" (JA 141, 173, 217, 324, 396, 509, 609), the FCC called for "statements of fact and memorandums of law" (JA 101) and obtained factual data from numerous sources including the parties, the Western Union study, the carriers' annual reports of operations to the FCC, and the Office of Telecommunications report (JA 101). "Notice and comment" procedures have a well-defined meaning in FCC practice, 47 C.F.R. §§ 1.413, 1.415, and were certainly not employed here.

point for review by an appellate court—which it did not[20]—it raised no issues of fact appropriate for resolution in the "trial-type hearing" which it now seeks (Brief at 18); its view of the meaning of the "full hearing" language of Section 222(e)(3) is contrary to the case law; and it shows no basis even now, in terms of prejudice or otherwise, for claiming abuse of discretion by the FCC in proceeding as it did.

A. RCA Globcom raised no issue appropriate for resolution in a trial-type hearing before an administrative agency.

RCA Globcom does not identify the evidence it was allegedly prevented, to its prejudice, from presenting in oral form in a trial-type hearing until the very end of its discussion of the full hearing point in its brief (Brief at

---

20. RCA Globcom, for example, did not at the places cited by it in its brief as setting forth its requests for a "trial-type hearing" ask for anything more than an "oral evidentiary hearing" in place of the written evidentiary hearing it was afforded (JA 192-193). It paid no heed to the FCC's indication that it would consider requests for oral hearings after the submission of factual data as appropriate in the light of such data, but instead made a *pro forma* request without offer of proof or elaboration (JA 100, 192-193). Finally, and most importantly, by its own account it waived its request for an oral evidentiary hearing in return for the FCC's order directing the Western Union study and then sought to retract that waiver after the Western Union study was submitted, without indicating in any way how the results of the study made an oral hearing appropriate (JA 528). Under the circumstances RCA Globcom has failed to preserve its objections to the procedures employed below. *Brotherhood of Railroad Trainmen* v. *Central of Ga.*, 415 F.2d 403, 417 (5th Cir. 1969), *cert. denied* 396 U.S. 1008 (1969); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 632-33 (D.C. Cir. 1966), *cert. denied* 385 U.S. 843 (1966); *Upjohn Co.* v. *Finch*, 422 F.2d 944, 955 (6th Cir. 1970); *Siegel* v. *AEC*, 400 F.2d 778, 782, 784-85 (D.C. Cir. 1968); *American Public Gas Ass'n* v. *FPC*, 498 F.2d 718, 723 (D.C. Cir. 1974), *cert. denied* 405 U.S. 1074 (1972); and see, *Long Island R. R.* v. *United States*, 318 F.Supp. 490, 499 (E.D.N.Y. 1970) (three judge court).

33-34).[21] As RCA Globcom recognizes, this list reduces itself essentially to evidence concerning "the understandable behavior patterns of the likely senders of unrouted telegrams" (Brief at 33) and expert opinions and forecasts concerning the likely course of future events. Neither of these matters, the courts have held, constitutes the kind of adjudicative fact which requires the paraphernalia of trial, oath, cross-examination and demeanor evidence for resolution.[22]

As was said in a case relied on by RCA Globcom, *Independent Bankers Association of Georgia* v. *Board of*

21. As noted above, the list of issues presented to this Court on which RCA Globcom says it would have offered oral evidence was never presented to the agency. RCA Globcom prefaces this list by saying "evidence on the following issues should have been received" (Brief at p. 44). Of course, nothing (except perhaps irrelevancy) prevented RCA Globcom from offering evidence in written form on these issues and RCA Globcom does not complain of any ruling of the FCC on the admissibility of proferred evidence. Presumably the list sets forth evidence which, in RCA Globcom's view, was best presented orally. However, it does not tell the Court why this is so. Presumably RCA Globcom would not need cross-examination and demeanor evidence to establish the credibility of its own witnesses and it does not claim lack of credibility on the part of anyone else. The suggestion at p. 33 of its brief that it would have liked "through expert testimony and otherwise to explore the Commission's core preference for all-routed traffic" may indicate a desire to subject the Commission to cross-examination but that desire is unlikely to be satisfied under any present conception of trial-type administrative proceedings. In any event the Commission did not act on any preference it may have for all-routed traffic in the Order under review.

22. Evidence concerning behavior patterns of the public—the kind of "general fact" not involving "the parties and their activities, business and properties" which Professor Davis, an authority relied on by RCA Globcom, calls a "legislative fact" (1 Davis, Administrative Law § 7.02, p. 413 (1958)) not requiring adjudicative proceedings for resolution—are involved in at least two of the issues listed: whether the public "cares" which carrier handles their traffic and the extent "the public is willing to pay" for increased costs (if such there be) from increased solicitation of routed traffic (Brief at pp. 33-34). Expert predictions rather than actual, present facts concerning the parties, their activities, business and properties are involved in the evidence offered this Court (but not below) as to "the extent . . . formula changes *will lead* to duplication of facilities . . .," what the cost *"will be"* of increased solicitation, whether increased competition for routings *"will* benefit the public," and how service can "be *expected* to improve" as a result of the formula

[Footnote continued on next page]

Governors of the Federal Reserve System, 516 F.2d 1206, 1220 (D.C. Cir. 1975):

> "The case law in this Circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by statute."

Accord, Producers Livestock Marketing Association v. *U. S.,* 241 F.2d 192, 196 (10th Cir. 1957), *aff'd,* 356 U.S. 282 (1958).[23] And in *American Airlines, Inc.* v. *CAB, supra,* 359 F.2d at 633 the court stated:

[Footnote continued from previous page]

changes. The issues as to what carrier actions caused the overages and deficiencies, how the formula acted as a disincentive to improved service and whether service is better to countries to which the carriers have in the past shared in the distribution of unrouted traffic are all issues without relevance to the FCC's actual decision, so that the absence of an oral presentation of evidence on these subjects in no way prejudiced RCA Globcom. As the FCC found, whatever the origin of the overages and deficiencies, their size and impact were beyond anything contemplated when the formula was originally devised (JA 15-16). Further, the disincentives implicit in the original formula, the FCC found, never had a chance to operate as originally contemplated so that their effect on service quality could be measured, owing to the small portion of the market in which the anticipated proportioned distribution of unrouted traffic actually occurred (JA 16-17). In all events, in the absence of any explanation by RCA Globcom as to why evidence on its listed issues could only be presented in oral form, and of any issue of reliability concerning the evidence on which the FCC based its decision, it is difficult to see how RCA Globcom would have benefited by an oral presentation or was prejudiced by its absence.

23. The same rule is recognized as part of the provisions of the Administrative Procedure Act on which RCA Globcom bases its request for a trial-type hearing in this rule making proceeding. Thus, Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 556 (d)) provides:

> . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination *as may be required for a full and untrue disclosure of the facts.* In rule making or determining claims for money or benefits . . . an agency may, *when a party will not be prejudiced thereby,* adopt procedures for the submission of all or part of the evidence in written form." (Emphasis supplied.)

> "The particular point most controverted by petitioners is the effect of the CAB regulation on their business. The issue involves what Professor Davis calls 'legislative' rather than 'adjudicative' facts. It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings."[24]

---

24. The distinction between legislative and adjudicative facts was also discussed in another case relied on by RCA Globcom, *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U. S. 1026 (1975). In that case, the court stated:

> "Professor Davis distinguishes between two types of factual disputes: those which can and those which cannot be "decisively resolved" by evidentiary submissions. Davis, Administrative Law Treatise, § 7.06 (1958 ed.). While those which can be decisively resolved ("adjudicative facts") should be subject to evidentiary hearings, those which do not lend themselves to evidentiary resolution ("legislative facts") obviously do not require adjudicatory proceedings. See *SEC* v. *Frank*, 388 F.2d 486, 491-492 (2d Cir. 1968); *American Airlines, Inc.* v. *CAB*, 123 U.S. App. D.C. 310, 359 F.2d 624, 633 *cert. denied*, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed. 2d 75 (1966); cf. *Virgin Islands Hotel Association* v. *Virgin Islands Water & Power Authority*, 476 F.2d 1263, 1268 (3d Cir. 1973)."

The two phrases are defined as follows in the treatise (1 Davis, Administrative Law § 7.02, p. 413 (1958)):

> "For purposes of this problem, [the need for a trial type of hearing] facts are of two kinds—adjudicative and legislative. Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the question of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."

This Court has recognized the distinction, in *SEC* v. *Frank*, 388 F.2d 486, 491-2 (2d Cir. 1968), as well as in *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971), cited by RCA Globcom.

B. A "full hearing" is in any event not a trial-type hearing.

RCA Globcom devotes the bulk of its brief to developing an argument that there is a *per se* rule, Cf. *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), requiring a trial-type hearing whenever the applicable statute directs that the hearing be "full". Neither the statute, the case law, nor the so-called "consistent administrative practice" of the agency referred to by RCA Globcom supports such a conclusion.

(1) *Section 222(e)(3).* RCA Globcom argues that the "full hearing" language of Section 222(e)(3) *ex proprio vigore* was intended by Congress to mean a trial-type hearing. No evidence of such a legislative intention is offered.[25]

---

25. RCA Globcom attempts to supply this deficiency by referring to certain so-called "great cases," including *Morgan* v. *United States*, 304 U.S. 1 (1938), which according to RCA Globcom, had "symbolic" significance in 1943, and spoke "to a great deal more than that which they precisely covered" (Brief at 30-31), leading Congress to use the expression "full hearing" when it meant to refer to full-dress trials. The actual significance of these cases is discussed *infra* at p. 28 fn. 30. The symbolic significance RCA Globcom attributes to them is not established by the one contemporary source it cites—Professor Hart's review of the 1937-38 Term of the Supreme Court in 53 Harv. L. Rev., 579, 624-25 (1940). In that article Professor Hart recognized that *Morgan* meant no more than it said:

> "The Court found that the complainants had been given no adequate notice of, or opportunity to address argument to, the issues which were critical in framing the order, nor opportunity to answer arguments addressed to the Secretary by subordinates in the Department who had been active in the prosecution of the Department's case." *Id.* at 625 n. 112.

The trend which Professor Hart saw in *Morgan* was simply a trend away from judicial review of the substance of agency decisions and towards review of the agency's procedural fairness. Significantly, Professor Hart stated in this connection:

> "Moreover, and most important of all, the criteria of fairness need not always be stated as absolutes." *Id.* at 626.

[Footnote continued on next page]

In place of such evidence RCA Globcom sets forth the Supreme Court's interpretation of another Section of the Communications Act (Section 309(b)—now 309(e)—66 Stat. 715 (1952) relating to FCC action on applications of radio broadcasters for construction permits and station licenses) in which the language "full hearing" appears. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). When the language of Section 309 is read in its entirety and compared with the language of Section 222(e)(3) it becomes clear why the Supreme Court stated in *Storer* that Section 309 hearings were intended by Congress to have certain of the attributes of a trial-type proceeding.[26]

[Footnote continued from previous page]

The suggestion of RCA Globcom in this case that a *Morgan* hearing involves by definition a full dress trial involves just the kind of straitjacket on agency proceedings which Hart saw *Morgan* as avoiding. In all events, RCA Globcom offers nothing from the legislative history of Section 222 or otherwise to establish that Congress had in mind *Morgan* or Professor Hart's interpretation of it at the time the statute was enacted.

26. Section 309 read, at the time of the *Storer* decision, as follows, 66 Stat. 715 (1952):

> "Sec. 309. (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> "(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The

[Footnote continued on next page]

Not only do the procedures set forth in Section 309 on their face escalate from a pleading to a written evidentiary and

---

[Footnote continued from previous page]

parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. *Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate* but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

"(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall contain such allegations of fact as will show the protestant to be a party in interest and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. The Commission shall, within fifteen days from the date of the filing of such protest, enter findings as to whether such protest meets the foregoing requirements and if it so finds the application involved shall be set for hearing upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission. *In any hearing* subsequently held upon such application *all issues specified* by the Commission *shall be tried in the same manner provided in subsection (b) hereof,* but with respect to all issues set forth in the protest and not specifically adopted by the Commission, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing." (Emphasis supplied.)

then to an oral evidentiary stage,[27] but subsection 309(c) explicitly states that in hearings held under that subsection (which are not referred to as "full hearings") "all issues . . . shall be *tried* in the same manner provided in subsection (b) hereof." The very absence from Section 222(e)(3) of the elaborate procedural details which Congress thought necessary to spell out in Section 309 suggests that the words "full hearing" in and of themselves were not considered by Congress sufficient to alert the agency to an intention that trial-type hearings were required.[28] Indeed, the elaboration of the "full hearing" language in Section 309 by the words immediately following them (". . . in which the applicant and all other parties in interest shall be permitted to participate") suggests the true impact of the word "full": a "full hearing" is one in which all interested parties, not simply the applicant and the Commission, get their say and are given opportunity for reply and rebuttal until the issues

---

27. The Section provides that if the application cannot be granted by the FCC on the basis of the material contained in the application, the FCC shall advise the parties of objections to it and the parties shall have an opportunity to reply. If the requisite findings cannot be made on the basis of the replies, the FCC is directed to "formally designate the application for hearing." Parties in interest may intervene "not less than ten days prior to the date of hearing." At the hearing "the burden of proceeding with the introduction of evidence . . . as well as the burden of proof . . . shall be upon the applicant."

28. RCA Globcom implicitly acknowledges the force of this interpretation of *Storer* by making the identical argument in support of its interpretation of Section 222(e)(3), relying on the use of the word "complaint" in that Section as a "verbal clue" with respect to Congress' alleged intention to provide for full-dress trials under Section 222(e)(3). (Brief at 24n.). However, the very contrast between the abundant evidence given by Congress in Section 309 as to its intention to provide for trials under that section and the very meager support which RCA Globcom finds in Section 222(e)(3) for its position, makes clear how out of tune RCA Globcom's interpretation is with what it refers to (following Judge Learned Hand) as the "melody" of Section 222. *Cf. Helvering* v. *Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934), *aff'd.*, 293 U.S. 465 (1935).

are fully aired. Neither *Storer*[29] nor any of the other cases relied on by RCA Globcom on this point involved the denial of an opportunity to present evidence in oral as opposed to written form or the denial of an opportunity for oral cross-examination. Indeed, the cases relied on by RCA Globcom[30] all demonstrate that a full hearing is simply one in which there is "a full and true disclosure of the facts" (*United States* v. *Storer Broadcasting Co.*, 351 U.S. at 202) without any attempt by the courts to establish a *per se* rule with regard to the type of procedures, oral or written, to be used to obtain this end.

The one case which has been found which explicitly considered whether "full hearing" language—in that case appearing in Section 4 of the Natural Gas Act, 15 U.S.C. § 717c(e)—"forced [the agency] to adopt the procedures

---

29. It should be noted that the Court in *Storer* did not mandate the use of "trial-type" procedures, but required only that a party be given an adequate opportunity to present his case and rebuttal, by "oral or documentary" evidence. 351 U.S. at 202. The Court expressly limited the right of cross-examination to "such cross-examination as may be required for a full and true disclosure of the facts," *Ibid.* Thus, even if *Storer* were applicable here, no cross-examination would be required since the factual predicate of the Commission's Order (*i.e.*, the Western Union traffic study) is not in dispute.

30. *Morgan* v. *United States*, 298 U.S. 468 (1936) involved, as the Supreme Court later noted in *United States* v. *Florida East Coast Rwy.*, 410 U.S. 224, 242 (1973), a failure by the Secretary of Agriculture to make his decision on the basis of the evidence and argument presented by the parties. *New England Divisions Case*, 261 U.S. 184 (1923) found that a "full hearing" had been granted because the parties were afforded ample opportunity to make "by evidence and argument, a showing fairly adequate to establish" the propriety of the step the agency was asked to take. Such an opportunity was afforded here. *Morgan* v. *United States*, 304 U.S. 1 (1938), held that the full hearing requirement of the Stockyards Act necessitated "a reasonable opportunity to know the claims of the opposing party and to meet them." Such opportunity was provided in this case. *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 88 (1913) turned on the ICC's failure to obtain substantial evidence on which to support its findings.

of trial, with formal hearings, oral testimony under oath, cross-examination and the like", rejected that contention. *American Public Gas Ass'n.* v. *FPC,* 498 F.2d 718, 722 (D.C. Cir. 1974), citing *inter alia, United States* v. *Florida East Coast Rwy.,* 410 U.S. 224 (1973). See also *Washington Utilities & Transp. Com'n.* v. *FCC,* 513 F.2d 1142, 1161-64 (9th Cir. 1975), *cert. denied,* 423 U.S. 836 (1975), denying an adjudicatory hearing requested both under Section 309 of the Communications Act, 47 U.S.C. § 309—the statute involved in *Storer*—and under Section 214(d) of the same statute which requires "full opportunity for hearing."

2. *Administrative Procedure Act Section 4(c), 5 U.S.C. § 553(c).* RCA Globcom next argues that the provisions of the Administrative Procedures Act, 5 U.S.C. § 553(c) required a trial-type hearing. Those provisions state:

> "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title shall apply instead of this subsection."[31]

The Supreme Court has recently recognized that:

> "Sections 556 and 557 need be applied 'Only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record.' *Siegel* v. *Atomic Energy Comm'n,* 130 U.S. App. D.C. 307, 314, 400 F.2d 778, 785 (1968); *Joseph E. Seagram & Sons, Inc.* v. *Dillon,* 120 U.S. App. D.C. 112, 115 n. 9, 344 F.2d 497, 500 n. 9 (1965). Cf. *First National Bank* v. *First Federal Savings & Loan*

31. Section 556 makes provision for the submission of "oral or documentary evidence" and for "cross-examination as may be required for a full and true disclosure of the facts." It also states:

> "In rule making . . . an agency may, when a party *will not be prejudiced thereby,* adopt procedures for the submission of all or part of the evidence in written form." (Emphasis supplied.)

Assn., 96 U.S. App. D.C. 194, 225 F.2d 33 (1955)." *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742, 757 (1971).[32]

RCA Globcom points to nothing "in addition" to the full hearing language of Section 222(e)(3) as an explicit prescription that determinations under that subsection are to be made "on the record."[33] That Section does not even contain a mandate that specific factual matters be considered by the agency prior to reaching a determination, as did the statute at issue in *United States* v. *Florida East Coast Rwy. Co., supra,* a case in which the Supreme Court held that formal administrative hearings were not required.[34]

In the face of this case law, RCA Globcom resorts to agency interpretation of the Administrative Procedure Act and administrative practice under Section 222(e)(3) in support of its argument. So far as the agency's interpreta-

32. *See also, United States* v. *Florida East Coast Rwy. Co.*, 410 U.S. 224 (1973); *Duquesne Light Co.* v. *EPA*, 481 F.2d 1 (3rd Cir. 1973); *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *Mobil Oil Co.* v. *FPC*, 483 F.2d. 1238, 1250 (D.C. Cir. 1973); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 630 n. 48 (D.C. Cir. 1973).

33. As noted in *United States* v. *Florida East Coast Rwy. Co.*, 410 U.S. at 237-38, Congress has, in other statutes, made explicit provisions that rules be made "on the record." *E.g.* 41 U.S.C. §43a; 21 U.S.C. §371(e)(3).

34. The argument that nothing "in addition" to the hearing language of Section 222(e)(3) is required since a full hearing was understood at the time Section 222(e)(3) was enacted to require a trial-type hearing was rejected in the *Alleghany-Ludlum* and *Florida East Coast* cases, *supra.* In any event, as demonstrated in the discussion of the full hearing cases in subdivision (1) of this Point, *supra,* the words "full hearing" never imported in or of themselves a trial-type proceeding. What is at issue, in any event, is Congress' intention in using the words "on the record" at the time it enacted the Administrative Procedure Act—not what it thought a "full hearing" meant in 1943 when it enacted Section 222(e)(3).

tion of the Administrative Procedure Act is concerned,[35] the Supreme Court has recognized that no deference is owed to the expertise of a particular agency in interpreting that statute. *United States* v. *Florida East Coast Rwy. Co., supra,* 410 U.S. at 236, n. 6; and see, *Bell Telephone Company of Pennsylvania* v. *FCC, supra,* 503 F.2d at 1264-65. Moreover, nothing in the examples of earlier Section 222(e)(3) proceedings cited by RCA Globcom suggests that the agency based the form of its proceedings upon an interpretation of the "full hearing" language of Section 222(e)(3) as opposed to "a matter of procedural policy, reflecting the Commission's view of the most efficacious and just method" appropriate in the particular case.[36] *Bell Telephone Company of Pennsylvania* v. *FCC, supra,* 503 F.2d at 1264.

Clearly, trial-type procedures were appropriate to resolve Western Union's applications[37] under Section 222(e)(3) to increase its share of the revenues from unrouted interna-

35. RCA Globcom refers to an interpretation, contained in the Commission's rules on *ex parte* communications prior to 1974, 30 Fed. Reg. 9262 (1965), which was simply wrong and which was corrected by the Commission well before the completion of these proceedings. See 47 C.F.R. § 1.1207. The rule was wrong not only in stating that all proceedings under Section 222(e) — including hearings not described as "full", *see e.g.* Section 222(e)(2)—"are required by statute to be decided on the record," but also in stating that proceedings under Sections 201(a) and 214(d) are required to be trial-type. The courts have held to the contrary. *Bell Telephone Co.* v. *FCC,* 503 F.2d 1250 (3rd Cir. 1974); *Washington Utilities and Transp. Com'n.* v. *FCC,* 513 F.2d 1142 (9th Cir. 1975), *cert. denied,* 423 U.S. 836 (1975).

36. The opinion of the FCC's Review Board (not the FCC itself) in *International Record Carriers Scope of Operations,* 44 F.C.C. 2d 1069 (1974), may appear to be an exception, but an examination of the opinion in that case reveals that the Review Board relied upon the erroneous interpretation of the Administrative Procedure Act contained in then 47 C.F.R. § 1.1207 and subsequently corrected by the Commission. See fn. 35, *supra.*

37. *Western Union Tel. Co.,* 25 F.C.C. 535 (1958); 2 F.C.C. 2d 892 (1966); 43 F.C.C. 2d 661 (1973).

tional telegraph traffic on the ground that it was not receiving a fair rate of return. Those proceedings were essentially ratemaking proceedings traditionally handled by the FCC as adjudicatory matters. See, *e.g., Telpak Tariff Sharing,* 23 F.C.C. 2d 606, 624 (1970).

The remaining two instances of agency practice which RCA Globcom contends are examples of the use of trial-type procedures as a result of the "full hearing" provisions of Section 222(e)(3) do not involve that subsection at all. The original Western Union merger proceedings, in connection with which hearings were held in Washington and San Francisco, followed the mandate of Section 222(c) that there be a "public hearing" on the merger. *Application for Merger of the Western Union Telegraph Company and Postal Telegraph, Inc.,* 10 F.C.C. 148 (1943). The Western Union divestiture proceeding, 30 F.C.C. 323 (1961), was carried out under Section 222(c)(2), which says nothing concerning the type of hearing to be afforded in order to determine such issues as whether "the consideration for the property to be divested is . . . commensurate with its value," but which plainly involves the kind of adjudicative facts concerning the carrier, its activities and properties most appropriately resolved in an adjudicatory proceeding.

C. The FCC did not abuse its discretion in denying RCA Globcom a trial-type hearing.

Mischaracterizing the FCC's procedures as a "notice and comment" or "write-me-a-letter" technique, RCA Globcom argues finally that the Commission abused its discretion in not ordering a trial-type hearing, apparently in the belief that only such a hearing could "fit the issues before it." (Brief at 32.) As demonstrated above, *supra* at pp. 21-22, fn. 22, its list of issues is confined to general facts of a legislative nature and expert forecasts with respect to which "a

month of experience will be worth a year of hearings."[38] *American Airlines, Inc.* v. *CAB, supra,* 359 F.2d at 633 (D.C. Cir. 1966). In all events it would be more appropriate, under the case law, to say that the FCC would have abused its discretion had it ordered time-consuming and unnecessary trial-type hearings, than it is to argue the contrary.

The Supreme Court has recognized the FCC's need for procedural flexibility in making public interest determinations under the Communications Act. *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940); *see also, In re Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

Moreover, Congress has directed the FCC in 47 U.S.C. § 154(j) to "conduct its proceedings in such manner as will best conduce to the proper dispatch of its business," a provision which the courts have recognized prevents any construction of the Communications Act as mandating trials in all cases in which hearings are called for. *Bell Telephone Company of Pennlylvania* v. *FCC, supra,* 503 F.2d at 1265.

Finally, this Court and other courts have generally evinced a preference for the less formal procedures of rule making over the formalities of adjudicatory proceedings when new policy is being formed.[39] *WBEN, Inc.* v. *United*

38. Here, ironically, the FCC had, along with other information, three months of experience—in the thirteen week Western Union study alone—on which to base its decision.

39. In a series of footnotes (Brief at 15n, 23n, 31n, 44n) RCA Globcom advances somewhat tentatively an argument that, while Section 222(e)(3) proceedings "are, in a technical sense 'rule makings'," they have "an adjudicatory cast" requiring trial-type proceedings. Brief at 31. The factual basis for this argument is that (1) such proceedings affect "only the commercial interests *inter sese* of a small, and readily identifiable, group of companies" (Brief at 31); (2) the pool of unrouted traffic represents a specific *"res"* in which only the IRCs have an interest (Brief at 23n); (3) no member of the public intervened in the proceedings below (Brief at 15n); and (4) "there are, in substance, if not in technical form, elements of contract which underpin the current formula" (Brief at 44n). The hesitancy with which this argument is advanced is understandable, since it is implicitly premised on the rather presumptuous claim by

[Footnote continued on next page]

States, 396 F.2d 601, 618 (2d Cir.), *cert. denied,* 393 U.S. 914 (1968); *Long Island Railroad Co.* v. *United States,* 318 F. Supp. 490, 496 (E.D.N.Y. 1970) (three-judge court, per Judge Friendly); *National Petroleum Refiners Ass'n.* v. *FTC,* 482 F.2d 672, 681-83 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974); *Duquesne Light Co.* v. *EPA,* 481 F.2d 1, 7 (3rd Cir. 1973); *Bell Telephone Company of Pennsylvania* v. *FCC, supra,* 503 F.2d at 1265-66.

The cases cited by RCA Globcom fail to establish an abuse of discretion in this case. *Walter Holm & Co.* v. *Hardin,* 449 F.2d 1009 (D.C. Cir. 1971), permitted food importers to have an opportunity to present their arguments orally to the Secretary of Agriculture on the desirability of restrictions obtained by domestic producers on the size of imported tomatoes. This was done in the interest of fairness to outsiders to the industry which was regulated by the Secretary, and to avoid an appearance that the agency was dominated by that industry.[40] RCA Globcom is no more an outsider to FCC regulation than is ITT Worldcom.

[Footnote continued from previous page]

RCA Globcom that it, and the other international carriers, have some sort of vested interest in the pool of unrouted international telegraph traffic—a pool consisting of message traffic which, by definition, no customer has seen fit to award to RCA Globcom or to any other carrier. The assertion that RCA Globcom or any other carrier has a right, contractual or otherwise, to a portion of this unrouted traffic is totally unsupportable. Cf. *Dyer* v. *SEC,* 287 F.2d 773, 779-80 (8th Cir. 1961). Moreover, it is precisely because of the small stake which occasional senders of international telegrams have in the allocation of their unrouted messages (which explains not only their failure to intervene in this proceeding but also their failure to route the messages in the first place) that the FCC has properly stepped in to represent the public interest in the aggregate by making the policy determination that distribution of this traffic among the carriers should be in accord with the preferences among the carriers demonstrated by those who do route their traffic.

40. The Court in *Walter Holm,* moreover, allowed the agency's regulation to stay in effect as an interim, *pendente lite* provision, pending the outcome of the oral hearings. 449 F.2d at 1016.

City of Chicago v. *FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972), and *Mobil Oil Corp.* v. *FCC*, 483 F.2d 1238 (D.C. Cir. 1973), dealt not with the nature of the proceedings required before the agency—in the choice of which both courts stated there should be flexibility—but rather with the scope of appellate review as influenced by the type of procedure employed. *Appalachian Power Company* v. *EPA*, 477 F.2d 495 (4th Cir. 1973), involved the denial of any hearing whatsoever. *Independent Bankers Ass'n of Georgia* v. *Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975), involved the issue of whether deletion of "on the record" language from the Board's statute evidenced a Congressional intention to change the nature of the hearings on expansions by bank holding companies. In *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971), this Court decided not only that the FHA proceedings there at issue did not have to be trial-type proceedings, but that they did not even have to comply with 5 U.S.C. § 553.[41]

41. RCA Globcom places particular reliance (Brief at 34-36) on language in *Mobil Oil Corp.* v. *FPC*, *supra* and *Independent Bankers Ass'n of Georgia* v. *Board of Governors*, *supra*, condemning the use of "informal comments" in the former case and the absence of an "evidentiary hearing" in the latter. As pointed out above, RCA Globcom was not confined to "informal comments" in this case; it took advantage of the FCC's request for a series of factual memoranda to present affidavits, statistics and even a photograph. It had an evidentiary hearing in which the evidence introduced by others was submitted to "the process of testing and illumination ordinarily associated with adversary, adjudicative procedures." *Mobil Oil Corp.* v. *FPC*, 483 F.2d at 1260. All that was lacking was oral, as opposed to written, presentation and neither of the cases cited—nor any other relied on by RCA Globcom in its brief—establishes that an "oral evidentiary hearing" (which is all that RCA Globcom ever asked for—JA 192-193) is required for a hearing to be "full."

POINT II

THE FCC DID NOT ABUSE ITS DISCRETION IN PRESCRIBING THE NEW FORMULA AND GAVE THE STATEMENT OF ITS BASIS AND PURPOSE REQUIRED BY LAW.

RCA Globcom taxes the Commission with not being sufficiently explicit in making the statutory findings which it says are required by Section 222(e)(3) for promulgation of a new formula (Brief at 46 *et seq.*).[42] The FCC's opinion refers to the new formula as providing an "equitable means of distribution" (JA 28), as placing distribution on a "rational" basis (JA 17), as eliminating "unfair" advantages and avoiding "undue" benefits to any party (JA 22, 28) and concludes: "the public interest . . . will best be served by relying primarily on customer choice for the distribution of traffic among the several international record carriers" (JA 35). It is difficult to see what more RCA Globcom can ask for.[43]

---

42. In fact Section 222(e)(3) does not require any explicit findings by the FCC as a prerequisite to its prescription of a new formula. While a pre-existing formula may be invalidated only if "the Commission finds" that the old formula is unjust, unreasonable or inequitable or not in the public interest, the Commission is merely directed thereafter to prescribe a formula "which will be just, reasonable, equitable and in the public interest." Under the circumstances all that is required of the agency is that it not abuse its discretion or act arbitrarily or capriciously in prescribing the new formula, 5 U.S.C. § 706(2)(A), and that it provide a statement of the new formula's "basis and purpose," 5 U.S.C. § 553(c). This it has done.

43. In all events, as RCA Globcom appears to recognize, all that is required is that the agency's findings not be "so vague and obscure as to make the judicial review contemplated in the Act a perfunctory process." *Colorado Interstate Co.* v. *FPC*, 324 U.S. 581, 595 (1945). "Ideal clarity" is not required "if the agency's path may reasonably be discerned." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851(D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

RCA Globcom next complains that the FCC had unspoken motives different from or in addition to[44] those which it articulated. These unspoken motives are identified variously by RCA Globcom as including a preference for competition for its own sake,[45] a decision to promulgate a system of all-routed traffic despite its explicit statement that it was not doing so and lacked an adequate basis for so doing (Brief at 36-37), and a belief that the new formula, while not rational, just, equitable or in the public interest, nevertheless represented "the best alternative then available" (Brief at 38). RCA Globcom has no basis either in the record or outside it for going behind the Commission's expressed purposes in promulgating the new formula. The grounds upon which an administrative order must be judged are those grounds upon which the record discloses that the agency's action was based.[46] But in any event it is clear from the record that the new formula stands on its own feet.

The basis for the FCC's new formula allocating unrouted traffic to the international carriers in direct proportion to their share of routed traffic in a periodically updated base year is that it assigns a role to customer choice which will have a favorable effect on service quality (JA 17, 74). Thus, the new formula gives added significance to the decision by a customer to route his traffic via

---

44. It is hard to see how the FCC can be faulted for finding that, in addition to being in the public interest, rational, just and equitable on its own merits, the new formula also has the advantage of being "a logical deduction from — and . . . an operational step towards" (Brief at 36) a later formula revision in which all traffic becomes routed.

45. This argument is presented by RCA Globcom as a separate point in its Brief and is answered separately in Point IV, *infra*.

46. *SEC* v. *Chenery Corp.*, 318 U.S., 80, 87 (1943); *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960); *United States ex rel. Checkman* v. *Laird*, 469 F.2d 773, 780 (2d Cir. 1972); *United States ex rel. Coates* v. *Laird*, 494 F.2d 709, 711 (4th Cir. 1974); *N.L.R.B.* v. *Clark*, 468 F.2d 459, 467 (5th Cir. 1972).

a specific carrier — a decision which is already recognized as a part of the present competitive market structure of the international telegraph business — by determining that that choice will carry with it not only the revenues to be won from handling the routed message itself but also the revenues to be won from an allocation of a portion of the unrouted traffic.

RCA Globcom questions whether this represents the FCC's real thinking on the matter because the Commission allegedly failed to answer RCA Globcom's questions as to whether customers who send unrouted traffic "care" which carrier handles their traffic and whether any conceivable service improvements can influence these customers to route via a specific carrier. What RCA Globcom fails to state is that the FCC itself recognized this lack of concern on the part of customers who do not now choose to route traffic and, *for this reason,* did not promulgate a system of all routed traffic (JA 27).

More significantly, what RCA Globcom studiously avoids mentioning is that the new formula is directed not only towards encouraging customers who do not presently route their traffic to enter the market place for international telegraph services and choose from among the various carriers the one which will handle their message best. In addition (as WUI recognizes in its brief at 17-18), the new formula is designed to reflect "changes in the market place" as it presently exists (JA 74), rewarding a carrier which, as a result of a better service offering at lower prices, succeeds in winning the presently routed business of sophisticated customers away from the competition.[47]

47. In its brief, at the pages mentioned above, WUI uses the perjorative term, "raiding," to refer to this competitive effort to win the routed traffic of sophisticated volume users. This term conjures up unpleasant images, but offers no factual basis for questioning the Commission's findings that the reason a customer will switch from one carrier to another will be because the successful carrier offers

[Footnote continued on next page]

What is indisputable and was not disputed below is that the large customers—the New York banks, for example, referred to in RCA Globcom's Brief at 37n.—which now route their traffic via one or another carrier do "care" which carrier handles their traffic and do care about service improvements, as RCA Globcom concedes (*Ibid.*). Since a decision by these sophisticated customers to change their routings from RCA Globcom to ITT Worldcom will carry with it not only the revenues to be won from that traffic, but also from a share of the unrouted traffic, it is clear by RCA Globcom's own logic that the new formula will assure a continuation and expansion of the service improvements which, as RCA Globcom itself boasts, have characterized competition in international telegraphy in the past (Brief at 71n; JA 329-330).

RCA Globcom's attempt to attribute the new formula to a view on the part of the FCC that it represents, not what the public interest requires, but simply "the best alternative then available" flies in the face of the Commission's explicit findings, and constitutes an effort by RCA Globcom to force the Commission's Order into the mold of *American Tel. & Tel. Co.* v. *FCC* (*Telpak*), 449 F.2d 439 (2d Cir. 1971) and the opinion following remand of that case in *National Ass'n of Motor Bus Owners* v. *FCC*, 460 F.2d 561 (2d Cir. 1972). The Order in this case does not fit the mold.

Telpak was a case in which the Commission expressly conceded that its decision represented no more than "the best of the alternatives discussed herein," 449 F.2d at 450, quoting 23 F.C.C. 2d at 624. The statutory findings were

---

[Footnote continued from previous page]

advantages in terms of lower charges or improved service not offered by the competition (JA 17, 74). In any event (and not surprisingly), neither WUI nor RCA Globcom argued below that the new formula should be rejected because their present customers do not care about service improvements or lower charges. Instead both pitched their arguments (as RCA Globcom continues to do in this Court) in terms of the lack of concern with respect to these factors on the part of customers who do not presently route their traffic.

found to have been omitted because of a "considered and deliberate [unwillingness] . . . to make a definitive finding." *Ibid.* The Commission's Common Carrier Bureau had, moreover, expressly found that the record in *Telpak* did "not establish an adequate basis for a definitive prescription by the Commission," 449 F.2d at 450-51, quoting 23 F.C.C. 2d at 658. This Court agreed. Further, in *Telpak* the FCC prescribed new rates for the carriers and treated the proceeding as an adjudicatory one, as to which the provisions of 5 U.S.C. § 557(c)(A) require an explicit statement of findings. No such formality is required in a rule making proceeding such as this one. *Logansport Broadcasting Corp.* v. *United States,* 210 F.2d 24, 27 (D.C. Cir. 1954).[48]

POINT III

THE FCC DID NOT ABUSE ITS DISCRETION IN FINDING THE OLD FORMULA UNJUST, IRRATIONAL, INEQUITABLE AND NOT IN THE PUBLIC INTEREST AND GAVE THE STATEMENT OF THE BASIS AND PURPOSE OF ITS ACTION REQUIRED BY LAW.

RCA Globcom, in its brief, ignores the fundamental finding of the FCC in support of its invalidation of the old formula, namely, that the formula failed to accomplish the objectives for which it was established, and is currently operating in an irrational and inequitable fashion never contemplated when it was conceived. RCA Globcom does not dispute the fundamental facts that the formula has

48. As a last resort RCA Globcom quarrels with the merits of the FCC's finding that the new formula will stimulate improvements in service quality, characterizing this as "glib" and "implausible" and attributing all service improvements in telegraph message handling to competition in other areas of carrier activity, such as telex service. Brief at 41n. RCA Globcom's arguments in this Court are, however, directly contrary to the position it took before the FCC, in which RCA Globcom extolled the improvements in customer service which have already resulted from competition among the carriers in the offering of international telegraph service. See pp. 47-48, *infra.*

permitted the accumulation of deficiencies and overages among the international carriers in a fashion never contemplated at its inception and has failed to accomplish the freezing of pre-war market shares, which was its original purpose.

Instead of joining issue with the FCC on these factual issues and conclusions, RCA Globcom seeks to overturn the FCC's Order by imposing on the Commission three purported rules of law, which are without basis in the statute, 47 U.S.C. § 222(e), or in the cases.[49] First, RCA Globcom argues, without citation of authority or basis in the statute, that there is a presumption in favor of any formula previously promulgated by the FCC, apparently on the theory that any formula is better than none (Brief at 43). Secondly, RCA Globcom argues in direct contradiction to the language of the statute that the FCC must not only find the formula irrational *or* inequitable *or* unjust but must also in addition find it not in the public interest. Finally, RCA Globcom argues that the FCC's public interest finding to support invalidation of the old formula must be based on a demonstration that service under the old formula was inadequate or provided at unreasonable cost. This third argument flies in the face of the FCC's mandate in the Communications Act, 47 U.S.C. § 151, to provide not simply adequate communications services at reasonable prices, but the best such services possible under the circumstances. *Western Union Division* v. *United States,* 87 F.Supp. 324, 335 (D.C. 1949), *aff'd.,* 338 U.S. 864 (1949); Cf. *ICC* v. *Parker,* 326 U.S. 60, 69 (1945); *N.Y. Central Securities Co.* v. *United States,* 287 U.S. 12, 25 (1932).

In support of its various arguments RCA Globcom taxes the FCC with ignoring the facts that the old formula did give any customer who wanted it the right to route his traffic (Brief at 44), that it did "establish a method of

49. Point III of RCA Globcom's Brief offers no case support for the argument made therein.

distributing unrouted traffic" (Brief at 44), that it did provide "for proportioned allocations" of traffic (Brief at 46), and that it did provide a method which "spared the many infrequent users of international telegraph service the burden of worrying about the structure of the international communications industry" (Brief at 46). The simple answer to these arguments is that any formula, no matter how irrational, unjust and inequitable, would accomplish the results of relieving customers of worry and allocating unrouted traffic in some fashion among the carriers. In any event, the FCC itself has provided an answer in its Order to RCA Globcom's complaint that any formula is better than none, by substituting a new formula which will avoid the dangers RCA Globcom perceives from the absence of any formula.

RCA Globcom's argument that the FCC erred in making its public interest finding by failing to demonstrate that service under the old formula was unsatisfactory and resulted in unreasonable costs neglects the fact that the public interest criterion in Section 222(e)(3) refers back to the FCC's overall mandate "to make available, *so far as possible,* to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. (Emphasis supplied). *Western Union Division* v. *United States, supra.* In *N.Y. Central Securities Co.* v. *United States, supra,* the Supreme Court interpreted a similar mandate to the ICC (from whose organic statute the Communications Act was drawn)[50] as requiring, not simply adequate service but the "best" avail-

50. The provisions regulating common carriers in the Communications Act were taken from the Interstate Commerce Act. *See S. Rep. No. 781,* 73d Congress, 2d Sess. (1934), p. 2, 4; *H.R. Rep. No. 1850,* 73d Congress, 2d Sess. (1934), p. 5. *See also, Curran* v. *MacKay Radio & Tel. Co.,* 123 F. Supp. 83, 89 (S.D.N.Y. 1954); *Stanley* v. *Western Union Tel. Co.,* 23 F. Supp. 674, 675 (S.D. Fla. 1938).

able. 287 U.S. at 25. In *ICC* v. *Parker, supra,* the Supreme Court expressly rejected a contention by motor carriers that expanded use of rail transportation "in the public interest" could only be premised on a finding that existing motor transportation services were inadequate and found that the public interest standard contemplates not merely the minimum level of acceptable service but the maximum attainable under the circumstances.

Arguments analogous to those raised by RCA Globcom were rejected in *Washington Utilities & Transp. Com'n.* v. *FCC,* 513 F.2d 1142 (9th Cir. 1975), *cert. denied,* 423 U.S. 836 (1975). In that case, the petitioners argued that the Communications Act prevented the FCC from authorizing additional carriers to compete in the specialized common carrier industry unless the Commission first found that the existing carriers could not provide adequate service. The court rejected this argument, because it "interprets the Communications Act too narrowly," 513 F.2d at 1157.

Contrary to RCA's assertions (Brief at 44-45), the Commission more than adequately explains why the distortions produced by the old formula are contrary to the public interest. There is no need (as RCA suggests there is) to find that service under the old formula is "unsatisfactory;" all that it was necessary to find (as the FCC did) was that the old formula failed to make use of an opportunity to improve service (JA 17, 74). The Order explains at length that the failure of the old formula to tie increases in routed traffic to increases in the award of unrouted traffic represents a failure to employ an obvious incentive to improve service, which is in the public interest. Thus, in addition to finding the old formula inequitable, unjust and irrational, the Commission correctly recognized that, through a formula giving greater effect to customer choice, the public

could play a greater role in determining the quality of service it receives than it has under the old formula.[51]

In all events, the argument that the FCC's public interest findings constituted an inadequate premise for invalidation of the old formula neglects the express language of Section 222(e)(3) of the Communications Act, 47 U.S.C. § 222(e)(3), which authorizes the FCC in the disjunctive to strike down a formula found "unjust, unreasonable or inequitable or not in the public interest." Having concluded that the old formula's award of overages and deficiencies was no longer functioning in the fashion originally contemplated, serving the rational purposes for which it was originally established or allocating unrouted traffic in a "just" or "equitable" manner, the FCC was not obliged to go further.

POINT IV

THE FCC'S DECISION DOES NOT FOSTER COMPETITION FOR ITS OWN SAKE

From what has been said, it is apparent that the FCC's decision promulgating the interim formula is firmly grounded in considerations of improved service quality which will be obtained by tying unrouted to routed traffic,

51. In a variation of RCA Globcom's argument that service under the old formula was not shown to be "unsatisfactory," WUI seeks to take advantage of the fact that the formula never operated as originally contemplated to argue that, as a result, the FCC had no basis on which to judge whether service would have been better if the restraints on competition implicit in the original formula had operated as planned. (Br. at 13-14). This myopic approach—focusing solely on what it concedes to be the small portion of the international telegraph market in which the formula in fact achieved the proportioned distribution of unrouted traffic originally contemplated *(Ibid.)*—ignores the benefits of competition in terms of service improvements in telegraphy detailed at length elsewhere in the record (JA 329-330) and implicit in the competitive market structure of the industry of which WUI forms a part, both of which factors are discussed below in Point IV of this Brief.

rather than on abstract theories or preferences concerning the appropriate market structure for the communications industry. Similarly, the Order invalidating the old formula is not dependent on a theoretical preference for, or abhorrence of, the market philosophy which led to the original formula's enactment, but rather on the simple conclusion that that philosophy, however evaluated, was not being accomplished in practice by the existing formula and on the conclusion that the old formula represented a missed opportunity to improve service in the public interest.

RCA Globcom argues as though the FCC's decision in this case introduced competition into a market where none had previously existed and mandated wasteful vying for business in a market characterized by a complete lack of interest on the part of customers as to the identity of the carrier handling their messages.[52] RCA Globcom's argument ignores, first, one of the basic "elements of industry background which the Commission's Opinions assume without articulation and which are not, so far as we are aware, controversial," that RCA Globcom includes in its Statement of the Case (Brief at 5n), namely, that international telegraph service, unlike, for example, international telephone service, has always been offered competitively by a number of international telegraph carriers. Secondly, RCA Globcom ignores the facts of record in this case which demonstrate that by far the largest number of customers presently sending international cables *do* care about the

52 RCA Globcom's paradigm case is that of the hinterland customer announcing to a European friend or relative in a "once-or-twice-in-a-lifetime" international cable an unusual event, such as a birth or death. Brief at 9n. However, as indicated below, the more typical sender of international cables today is the customer who deliberately "routes" his message via a designated international carrier. An example of this routing customer is the New York bank referred to by RCA Globcom (Brief at 37n) which, by RCA Globcom's own concession, makes its decision to route via a designated carrier on the basis of a comparative evaluation of that carrier's service offering against the service offered by competing carriers. *Ibid.*

identity of the carrier handling their messages and care enough to route their traffic via a specific carrier.[53] What the FCC did in its Order in this case was not to introduce competition for the first time in a market where none had previously existed. Instead, the FCC, as it said in its Order, merely removed certain impediments which "significantly blunted, although did not eliminate, competition in message service" (JA 26). In the interests of "elementary logic", the FCC promulgated a new formula pursuant to which allocation of unrouted traffic is determined by the international carrier's success in the competition which already characterizes the market as a whole. (*Ibid.*). By giving added force (in the form of an award of unrouted traffic) to the competition for message traffic which is already present in the industry, the FCC merely carried out the rationale of a competitive market structure already in existence.

In thus perfecting the competition already present in the market for international telegraph services, the FCC was not obliged—as RCA Globcom contends it was—to articulate all the reasons why a market characterized by competition is preferable to one in which a single carrier serves all customers. The choice of competition over monopoly in the market for international telegraph services has already been made. But even had the choice not been made previously, RCA Globcom is in no position to fault the FCC for failing to investigate and to detail the benefits of competition in the international telegraph market, since RCA

53. Thus, nearly two-thirds of annual outbound telegraph messages (5.6 out of 8.6 million) have in recent years been specifically routed via a designated carrier (JA 11). Even when the customer deals in the first instance with Western Union, close to one-quarter (23.5%) of the messages so originated are sent by customers who specifically advise Western Union that the overseas portion of the transmission should be handled by a designated international carrier *(Ibid.)*.

Globcom, far from questioning the benefits of competition,[54] itself detailed at great length in the record below the improvements in the provision of international telegraph service which have, in the past, resulted from competition among the carriers.[55] Thus, at pages 6-7 of its Reply Comments dated August 16, 1972, RCA Globcom presented the FCC with a two-page chronological list of service improvements made by it in the provision of international telegraph service, with the prefatory comment that "a list of all improvements in the method of providing international telegram service would be too extensive to include here" (JA 329-330).[56] Having thus relied upon the benefits

54. RCA Globcom, for example, at no time offered to show that its New York bank customers do not care which carrier handles their business and can conceive of no service improvements which might be made. Even in this Court it goes no further than arguing that "senders of unrouted telegrams" do not care which carrier handles their messages (Brief at 34)—a fact taken into account by the FCC in deciding not to promulgate a system in which all telegrams are required to be routed.

55. As RCA Globcom notes in its brief:

> "The business has been and is characterized by continuing technological innovation to increase the speed, ease and reliability of service (JA 329-30)." (Brief at 17n).

56. RCA Globcom appears to argue in this Court that such technological innovations as there have been in the provision of international telegraph service—the example given being the use of the satellites and earth stations of the INTELSAT system—are entirely a by-product of developments in "more sophisticated record services of particular utility to volume communicators in business and government," most prominently, international telex. Brief at 6n, 41n. Such an argument was never advanced before the FCC despite the agency's obvious expertise on the issue. Indeed, the technological improvements in telegraphy to which RCA Globcom referred the FCC in the record below (JA 329-330) on their face have nothing to do with satellite technology or with international telex. Moreover, RCA Globcom's argument that such technological improvements were only extended to telegraph since "it usually would be uneconomic not to do so" (Brief at 41n)—to the extent, if any, that such an argument proves that competitive motives had nothing to do with improvements in telegraph service—does not fit very well with its boast before the agency below that "RCA Globcom has consistently been a leader in improving the method of providing international telegram service so that a quicker, more cost-effective, and generally better quality service is provided to the customer" (JA 328-329).

of such competition as already exists in the international telegraph industry as an argument to support its position that no change at all should be made in the old formula, RCA Globcom is in no position to criticize the FCC's decision, once the old formula was struck down, to maximize those same benefits by the promulgation of a new formula in which competition is given added force.

In all events, the only cases cited by RCA Globcom in support of its argument that the FCC did not sufficiently investigate and detail the benefits, in terms of cost savings and service improvements, to be achieved by increased competition among the international carriers, *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); and *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974), have nothing to do with the situation which faced the FCC in this case.[57] In both of the cases cited the Commission was confronted with an initial choice as to whether it should introduce competition in a market previously characterized by monopoly. What prior history demonstrated in those cases was that monopoly worked well. What the Commission lacked in those cases it had in this one—namely, a past history of low prices and service improvements resulting from a competitive market environment. If RCA Globcom really intended to call into question the very rationale for its existence as a separate and independent competitor for

57. The cases RCA Globcom cites deal only with the type of findings the FCC must make to support its conclusion that competition is in the public interest, in situations in which the issue presented is whether competition is preferable to monopoly. The Supreme Court has, of course, consistently recognized that furtherance of the strong national economic policy in favor of competition is a legitimate objective for administrative agencies charged with acting in the public interest. *See, e.g., Bowman Transportation Inc.*, v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 298 (1974); *Gulf States Utility Co.* v. *FPC*, 411 U.S. 747, 759 (1973); *F.M.C.* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968); *U.S.* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *McLean Trucking Co.* v. *U.S.* 321 U.S. 67, 79-80 (1944); *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 218 (1943).

international telegraph business, it was obliged to do so on a record different from that which it presented to the FCC below.

Finally, the FCC can hardly be faulted in this case for any failure to predict in detail the eventual outcome of its efforts. In this respect a quotation from *FCC* v. *RCA Communications, Inc., supra* is germane.

> "In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conf.* v. *United States,* 342 U.S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, cf. *Labor Board* v. *Seven-Up Co.,* 344 U.S. 344, 348, ***". 346 U.S. at 96-97.

And see, *General Telephone Co. of Southwest* v. *United States,* 449 F.2d 846, 858 (5th Cir. 1971); *Washington Utilities and Transp. Com'n.* v. *FCC, supra,* 513 F.2d at 1157-1160.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Commission's Report and Order, released January 7, 1976, should be in all respects affirmed.

Respectfully submitted,

LeBoeuf, Lamb, Leiby & MacRae
Attorneys for Intervenor
ITT World Communications Inc.
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:
Charles P. Sifton,
John S. Kinzey,
Richard C. Cole,
and
Howard A. White,
John A. Ligon,

ITT World Communications Inc.
67 Broad Street
New York, New York 10005
(212) 797-3300

CERTIFICATE OF SERVICE

I am an attorney associated with the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for Intervenor, ITT World Communications Inc. I hereby certify that I have served the attached Brief of Intervenor ITT World Communications Inc. on all parties, by mailing true copies thereof to the following persons at the listed addresses:

Jack D. Smith, Esq.
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
Attorneys for Respondent
Federal Communications Commission

Honorable Donald I. Baker
Assistant Attorney General
U.S. Department of Justice
Washington, D.C. 20531
Attorney for Respondent
United States of America

H. Richard Schumacher, Esq.
Cahill, Gordon & Reindel
Attorneys for Petitioner
RCA Global Communications, Inc.
80 Pine Street
New York, New York 10005

Alvin K. Hellerstein, Esq.
Stroock & Stroock & Lavan
Attorneys for Intervenor
Western Union International, Inc.
61 Broadway
New York, New York 10006

Edward Bruce, Esq.
Covington & Burling
Attorneys for Intervenor
TRT Telecommunications Corp.
888 Sixteenth Street, N.W.
Washington, D.C. 20006

John S. Kinzey

Dated: November 19, 1976